PETITION FILED
AUG 31 1990

No. 89-2016

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,

v.

ASSOCIATED GAS DISTRIBUTORS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE ON BEHALF OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

JOHN H. CHEATHAM, III *
Senior Vice President and
General Counsel
555 13th Street, N.W.
Suite 300 West
Washington, D.C. 20004
(202) 626-3200
Attorney for Interstate Natural Gas Association of America

August 31, 1990

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-2016

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,

v.

ASSOCIATED GAS DISTRIBUTORS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Interstate Natural Gas Association of America ("INGAA") respectfully moves pursuant to Rule 37.2 for leave to file the attached brief *amicus curiae* in this case. Petitioner has consented to INGAA's filing of this brief. The consent of respondent, Columbia Gas Transmission Corporation, was requested but refused.

STATEMENT OF INTEREST

INGAA is a non-profit national trade association representing virtually all of the major interstate natural gas transmission companies operating in the United States. The companies account for over 90 percent of all natural gas transported and sold for resale in interstate commerce. INGAA's members also include major Cana-

dian interprovincial pipelines subject to regulation by the National Energy Board of Canada. INGAA's U.S. members are regulated by the Federal Energy Regulatory Commission ("Commission") under the Natural Gas Act, ("NGA"), 15 U.S.C. §§ 717 *et seq.* (1988), and to a lesser extent, under the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3301 *et seq.* (1988).

REASONS FOR GRANTING THE MOTION

The United States Court of Appeals for the District of Columbia Circuit in this case held that certain orders issued by the Commission prescribing an allocation of take-or-pay costs among pipeline customers, based on a "purchase deficiency" method, violated the "filed rate doctrine." The court of appeals accordingly held that the Commission was without statutory authority to adopt such an allocation method.

All interstate pipelines that have implemented the direct billing cost recovery mechanism for take-or-pay settlement costs prescribed by Order No. 500 [1] have been required to allocate such costs using the purchase deficiency method. The Commission has reported that through late 1989 interstate pipeline companies, most of whom are INGAA members, have incurred in excess of $8 billion of such costs. Some $3.4 billion of such costs have been included in direct bill charges and allocated on a purchase deficiency basis.[2] Thus, the court of appeals' decision, if affirmed, will require a reallocation of billions of dollars of costs among natural gas consumers. Moreover, by disrupting the method by which pipelines are permitted to recover their take-or-pay costs, the decision threatens to delay substantially the transition by pipelines into the new regime of competitive gas markets.

---

[1] Order No. 500, 52 Fed. Reg. 30,334 (1987), III FERC Stats. & Regs. ¶ 30,761 (1987).

[2] Order No. 500-H, 54 Fed. Reg. 52,344 (1989), III FERC Stats. & Regs. ¶ 30,867 (1989).

Apart from its unsettling impact on the allocation of take-or-pay costs, the legal conclusion reached by the court of appeals—that the filed rate doctrine prohibits the use of certain allocation methodologies—conflicts with the precedents of this Court, and constitutes an unwarranted intrusion upon the Commission's authority to prescribe ratemaking methodologies. This improper extension of the filed rate doctrine to determine questions of cost allocation will not only retard resolution of the take-or-pay problem, but it may also restrict the Commission's ability to fashion just and reasonable rates in numerous other contexts as well. INGAA urges the Supreme Court to resolve these issues and, in that regard, invites the Court to take special note of the words of Chief Judge Wald:

> I think the Court's current interpretation of the filed rate doctrine is overly rigid, at a time when the FERC needs latitude to navigate the recent dramatic changes in the structure of the natural gas industry * * *. It remains for the Supreme Court to settle this important question of how impenetrable a barrier the filed rate doctrine is to FERC's efforts at allocating the inevitable burdens stemming from fundamental readjustment of the pipeline industry.

Transwestern Pipeline Co. v. *FERC*, 897 F.2d 570 (D.C. Cir. 1990) (Wald, C.J., separate statement issued with denial of rehearing *en banc*).

INGAA, as representative of the interstate natural gas pipeline industry which is directly affected by the court of appeals' decision, has a unique perspective and interest which will aid this Court in its consideration of the issues herein.

CONCLUSION

WHEREFORE, for the foregoing reasons, INGAA respectfully requests that the following brief in support of petitioner be accepted for filing.

Respectfully submitted,

JOHN H. CHEATHAM, III *
Senior Vice President and
General Counsel
555 13th Street, N.W.
Suite 300 West
Washington, D.C. 20004
(202) 626-3200
Attorney for Interstate Natural Gas Association of America

August 31, 1990

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. RECENT D.C. CIRCUIT DECISIONS ARE HINDERING THE INDUSTRY'S EFFORTS TO PUT THE TAKE-OR-PAY PROBLEM BEHIND IT AND COMPLETE THE TRANSITION TO MORE COMPETITIVE GAS MARKETS	5
II. THE COURT OF APPEALS' DECISION IMPROPERLY EXPANDS THE FILED RATE DOCTRINE AND ERRONEOUSLY CONCLUDES THAT THE PURCHASE DEFICIENCY ALLOCATION METHOD RESULTS IN RETROACTIVE RATEMAKING	8
III. THE DECISION BELOW WOULD IMPROPERLY LIMIT THE COMMISSION'S RATEMAKING AUTHORITY	11
CONCLUSION	14

TABLE OF AUTHORITIES

Cases:	Page
Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981)	4, 9
Associated Gas Distributors v. FERC, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988)	6, 7
Associated Gas Distributors v. FERC, 893 F.2d 349 (D.C. Cir. 1989), *petitions for cert. filed*, 59 U.S.L.W. 3001 (U.S. June 20, 1990) (No. 89-1988), 59 U.S.L.W. 3001 (U.S. June 21, 1990) (Nos. 89-1989, 89-1990), 59 U.S.L.W. 3001 (U.S. June 22, 1990) (No. 89-2000), and 59 U.S.L.W. 3005 (U.S. June 21, 1990) (No. 89-2016)	3
Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)	4, 12
City of Cleveland v. FPC, 525 F.2d 845 (D.C. Cir. 1976)	9
City of Piqua v. FERC, 610 F.2d 950 (D.C. Cir. 1979)	10
Columbia Gas Transmission Corp. v. FERC, 831 F.2d 1135 (D.C. Cir. 1987), *modified on reh'g*, 844 F.2d 879 (D.C. Cir. 1988)	13
Columbia Gas Transmission Corp. v. FERC, 895 F.2d 791 (D.C. Cir. 1990), *petitions for cert. filed*, 59 U.S.L.W. 3005 (U.S. June 22, 1990) (No. 89-2001) and 59 U.S.L.W. 3065 (U.S. July 18, 1990) (No. 90-131)	13
Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 110 S. Ct. 2759 (1990)	4, 9
Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951)	11
Nader v. FCC, 520 F.2d 182 (D.C. Cir. 1975)	10
Public Utilities Commission of California v. FERC, 894 F.2d 1372 (D.C. Cir. 1990)	10
Transcontinental Gas Pipe Line Corp. v. FERC, No. 88-1741 (D.C. Cir. July 17, 1990)	6
Transwestern Pipeline Co. v. FERC, 897 F.2d 570 (D.C. Cir. 1990), *petition for cert. filed* (U.S. August 24, 1990) (No. 90-344)	13

TABLE OF AUTHORITIES—Continued

	Page
Administrative Orders:	
Order No. 380, 49 Fed. Reg. 22,778 (1984), FERC Stats. & Regs. [Regulations Preambles 1982-85] ¶ 30,571 (1984), *aff'd in relevant part, Wisconsin Gas Co. v. FERC*, 770 F.2d 1144 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986)	3, 6
Order No. 436, 50 Fed. Reg. 42,408 (1985), FERC Stats. & Regs. [Regulations Preambles 1982-85] ¶ 30,665 (1985)	3
Order No. 500, 52 Fed. Reg. 30,334 (1987), III FERC Stats. & Regs. ¶ 30,761 (1987)	3
Statutes and Regulations:	
Natural Gas Act, 15 U.S.C. §§ 717 *et seq.* (1988)	2
§ 4(c), 15 U.S.C. § 717c(c)	9
§ 4(d), 15 U.S.C. § 717c(d)	9
§ 5(a), 15 U.S.C. § 717d(a)	10
Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301 *et seq.* (1988)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-2016

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,

v.

ASSOCIATED GAS DISTRIBUTORS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF AMICUS CURIAE ON BEHALF OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Interstate Natural Gas Association of America ("INGAA") is a non-profit national trade association representing virtually all of the major interstate natural gas transmission companies operating in the United States. The companies account for over 90 percent of all natural gas transported and sold for resale in interstate commerce. INGAA's members also include major Canadian interprovincial pipelines subject to regulation by the National Energy Board of Canada. INGAA's

U.S. members are regulated by the Federal Energy Regulatory Commission ("Commission") under the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717 *et seq.* (1988), and to a lesser extent, under the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3301 *et seq.* (1988).

INGAA supports the petition for writ of certiorari filed by petitioner, the Commission. Four other petitions for writ of certiorari have been filed by other parties,[1] and INGAA supports such petitions to the extent that they assert that the court of appeals erred in rejecting the Commission's purchase deficiency allocation method.

SUMMARY OF ARGUMENT

During the last decade, federal regulation of the interstate natural gas pipeline industry was fundamentally altered and, as a result, the markets for natural gas as well as for services from natural gas pipelines have been irrevocably changed. Following adoption of the Natural Gas Policy Act of 1978, the Commission issued a series of orders designed to replace interstate pipelines as the principal suppliers of natural gas in favor of a system which offers additional supply alternatives to consumers. The Commission has implemented its policies through three major deregulatory initiatives which have necessitated a comprehensive restructuring of transactions for the purchase, sale, processing, and transportation of natural gas. In Order No. 380 the Commission eliminated pipeline minimum bills; in Order No. 436 the Commission provided for open-access transportation; and in

---

[1] *See The Berkshire Gas Co.* v. *Associated Gas Distributors, petition for cert. pending*, No. 89-1988 (filed June 20, 1990); *Tennessee Small General Service Customer Group* v. *Associated Gas Distributors, petition for cert. pending*, No. 89-1989 (filed June 21, 1990); *Tennessee Gas Pipeline Co.* v. *Associated Gas Distributors, petition for cert. pending*, No. 89-1990 (filed June 21, 1990); and *National Fuel Gas Supply Corp.* v. *Associated Gas Distributors, petition for cert. pending*, No. 89-2000 (filed June 22, 1990).

Order No. 500 the Commission permitted recovery, in part, of past and future take-or-pay costs.[2]

The Commission's restructuring of the industry has provided pipeline customers an unprecedented array of options for obtaining gas supply service. Though inadequate, Order No. 500 has provided interstate pipelines their only reasonable opportunity to recover a portion of their take-or-pay costs which were accrued as a consequence of the sweeping market transformation effected by the Commission's orders. The D.C. Circuit's decision in *Associated Gas Distributors* v. *FERC*, 893 F.2d 349 (D.C. Cir. 1989) (*"AGD II"*), if allowed to stand, interferes with pipelines' recovery of even a portion of such costs and thereby inhibits the transition to a new market-based regulatory regime. Moreover, it throws into disarray the economic and financial assumptions that pipelines have relied upon in planning future business arrangements in the restructured marketplace and could establish an adverse precedent that will affect future Commission decisions.

The interstate pipeline industry has committed literally billions of dollars to the resolution of the take-or-pay crisis confronting it as a result of the changes wrought by the Commission in the last several years. Although the opinion of the court below involves the efforts of only one interstate pipeline, Tennessee Gas Pipeline Company ("Tennessee"), to recover its take-or-pay costs through the Commission's Order No. 500 equitable sharing mechanism, virtually all pipelines have been required to use the cost recovery mechanism prescribed by Order No. 500 in

---

[2] Order No. 380, 49 Fed. Reg. 22,778 (1984), FERC Stats. & Regs. [Regulations Preambles 1982-85] ¶ 30,571 (1984), *aff'd in relevant part, Wisconsin Gas Co.* v. *FERC*, 770 F.2d 1144 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986); Order No. 436, 50 Fed. Reg. 42,408 (1985), FERC Stats. & Regs. [Regulations Preambles 1982-85] ¶ 30,665 (1985); and Order No. 500, 52 Fed. Reg. 30,334 (1987), III FERC Stats. & Regs. ¶ 30,761 (1987).

order to recover a portion of their take-or-pay costs. And, like Tennessee, these pipelines have been required to allocate such costs among their customers using the purchase deficiency method.

As the first case to review the prescribed allocation mechanism, the court of appeals' decision is of paramount importance to the entire industry. Rather than reviewing the allocation decision under the just and reasonable standard of the Natural Gas Act, however, the court of appeals has ruled that the Commission is totally without statutory authorization to base allocations on the purchasing decisions that gave rise to the costs. While the purchase deficiency method is not the only reasonable manner of allocating take-or-pay costs, INGAA submits that the adoption of this method was well within the Commission's statutory authority.

As shown herein, the court of appeals concluded erroneously that the purchase deficiency allocation method would alter past rates; it does not. Moreover, in finding that the method violates the filed rate doctrine, the court of appeals has improperly expanded the filed rate doctrine contrary to this Court's decision in *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981) (*"Arkla"*). *See also Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 110 S. Ct. 2759 (1990). Additionally, the court of appeals' decision usurps the Commission's role as the primary interpreter of the NGA in violation of this Court's decision in *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984), thereby improperly limiting the Commission's ratemaking authority. The D.C. Circuit, in its decision herein, as well as in other recent opinions addressing the filed rate doctrine and retroactive ratemaking, has chosen to reject rate methodologies approved by the Commission, effectively substituting its judgment for that of the Commission.

INGAA submits that these legal errors, and the potential for widespread disruption of pipelines' efforts to

recover their take-or-pay costs and restructure their business arrangements in response to the new competitive market for natural gas, clearly warrant reversal of the decision. The bases for these contentions are set forth below.

ARGUMENT

I. RECENT D.C. CIRCUIT DECISIONS ARE HINDERING THE INDUSTRY'S EFFORTS TO PUT THE TAKE-OR-PAY PROBLEM BEHIND IT AND COMPLETE THE TRANSITION TO MORE COMPETITIVE GAS MARKETS.

In 1984, the Commission embarked on a program destined to bring about a radical restructuring of the natural gas industry. Until that time, interstate natural gas pipelines served as the principal aggregators and merchants of gas supplies to local distribution companies ("LDCs") and end-use markets. To carry out that function, pipelines assembled enormous inventories of gas reserves under long-term contracts. Such contracts typically obligated the pipeline to purchase a high percentage (usually 75 percent or greater) of the contractual supplies or nonetheless pay for them. Mirroring these "take-or-pay" obligations that attached to their supply contracts, interstate pipelines, with the Commission's express approval, established in their resale contracts and tariffs "minimum bills" under which LDCs and other customers were obligated to purchase a specified minimum quantity of gas. The Commission concluded in 1984 that such pipeline minimum bills, to the extent they applied to gas costs, had become "anti-competitive" in light of the enactment of the NGPA, and on that basis outlawed them.[3]

---

[3] Order No. 380 permitted minimum bills to continue to operate to the extent they recovered only "fixed costs", *i.e.*, the cost of the pipelines' investment in transmission and related facilities. The Commission has since proceeded on a case-by-case basis to eliminate even fixed cost minimum bills, although in one recent instance an order abrogating such a provision was reversed because of the Commission's failure to explain why the company's take-or-pay cost

The Commission brushed aside the pipelines' objection that the elimination of minimum bills would subject them to increased take-or-pay costs without providing a means of recovery. In affirming Order No. 380, the D.C. Circuit recognized this problem but allowed the Commission to defer action on take-or-pay based on the Commission's assurance that it would address the problem in a subsequent proceeding. *Wisconsin Gas Co.* v. *FERC*, 770 F.2d 1144, 1160 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986).

The Commission continued to restructure the industry in Order No. 436. Whereas Order No. 380 allowed customers that were served by more than one pipeline to choose the lowest cost pipeline, Order No. 436 allowed customers to negotiate directly with the suppliers behind the pipelines and then to compel the pipeline to transport such gas in competition with its own long-term supplies.[4] In Order No. 436, the Commission once again failed to address substantively the take-or-pay problem, and, in

---

exposure did not justify retention of the provision. *See Transcontinental Gas Pipe Line Corp.* v. *FERC*, No. 88-1741 (D.C. Cir. July 17, 1990).

[4] The Commission has argued that the "open-access" transportation program instituted by Order No. 436 was voluntary on the part of pipelines, but it was voluntary in name only. In a process that need not be detailed here, the Commission progressively eliminated any viable option to pipeline acquiescence in the open-access program. The D.C. Circuit in *Associated Gas Distributors* v. *FERC*, 824 F.2d 981, 1024 (D.C. Cir. 1987) recognized the involuntary nature of open-access transportation:

> FERC also alludes to the "voluntary" character of pipeline provision of Order No. 436 transportation. [citation omitted]. There are two flaws in this. First, refusal of the option may spell bankruptcy: inability to provide blanket-certificate transportation for fuel-switchable users may in current market circumstances cause critical load loss. Of course acceptance of the option may also be fatal. But when a condemned man is given the choice between the noose and the firing squad, we do not ordinarily say that he has "voluntarily" chosen to be hanged.

response, the court of appeals remanded the case to the Commission to address this critical problem. *See Associated Gas Distributors* v. *FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988) ("*AGD I*").

In response to the remand in *AGD I*, the Commission issued Order No. 500 and set forth therein an allocation methodology based on two principles: First, that pipelines required to transport gas for third parties on an "open-access" basis could not be expected to recover their take-or-pay costs through an increase in the unit (or "commodity") cost of the gas they sold to their traditional resale customers, but would instead require some form of fixed charge that would apply irrespective of the quantity of gas sold. Second, the Commission directed that take-or-pay costs should be allocated among customers on a basis that recognizes the customer's role in take-or-pay cost "causation." In the Commission's view, this latter factor necessarily considers the customer's purchasing activities which caused take-or-pay liabilities. Although it is possible to argue that there are other reasonable cost allocation schemes, the D.C. Circuit's surprising and unsupported conclusion that the "filed rate doctrine" wholly forecloses this allocation method, regardless of its merits, actually exacerbates the problem the Commission was charged with curing. The D.C. Circuit's holding would impermissibly narrow the terrain on which the Commission's judgment and expertise may operate at the very time innovative ratemaking is most required.

The consequences for pipelines and their customers are enormous and unfortunate. The immediate effect would be to require a reallocation of approximately $3.4 billion. In most cases, this reallocation will increase the costs borne by customers that contributed least to the creation of the costs. The effect on pipelines will be even more unsettling. Interstate pipelines have attempted since 1984 to persuade the Commission to address the mounting

take-or-pay crisis that has followed on the heels of the Commission's program. It is now too late for the pipelines to avoid the costs of this crisis. What is needed instead is the prompt implementation of an effective cost recovery system. The lower court's erroneous opinion, by improperly narrowing the Commission's rate options, delays the date on which such a system can be in place, perpetuates the cloud of uncertainty that has hung over the industry through most of the 1980's, and erects a new impediment to the creation of the orderly, efficient, and competitive gas markets which the Commission has claimed it wished to foster.

II. THE COURT OF APPEALS' DECISION IMPROPERLY EXPANDS THE FILED RATE DOCTRINE AND ERRONEOUSLY CONCLUDES THAT THE PURCHASE DEFICIENCY ALLOCATION METHOD RESULTS IN RETROACTIVE RATEMAKING.

In striking down the Commission's orders in this case, the court of appeals misapplied and improperly expanded the filed rate doctrine as it has been delineated in the decisions of this Court. Contrary to the court of appeals' opinion, neither the Natural Gas Act generally, nor the filed rate doctrine in particular, imposes any restriction on the cost allocation methods available to the Commission, other than the requirement that the allocation method selected produce just and reasonable rates. Cost allocation decisions are committed to the Commission's sound discretion and judgment based on a consideration of the relevant facts. Thus, the court of appeals erred fundamentally and departed from this Court's precedent in concluding that the filed rate doctrine prohibits the purchase deficiency method.

The court of appeals apparently viewed the filed rate doctrine and the rule against retroactive ratemaking simply as different formulations of the same principle. In fact, these two concepts have different statutory sources,

have spawned separate lines of precedent and serve entirely distinct purposes. More significantly, neither concept, nor the purposes they serve, implicate any issue involving cost allocation.

The "filed rate doctrine" as it applies to natural gas companies derives from Sections 4(c) and 4(d) of the NGA, 15 U.S.C. §§ 717c(c) and (d). *Arkla*, 453 U.S. at 576-77. These statutory provisions establish the general requirements that a regulated natural gas company (a) must maintain a schedule, *i.e.*, a tariff, on file with the Commission setting forth its rates and charges, and the classifications, practices, and regulations affecting such rates and charges and (b) must not change such rates, charges, classifications, etc., without appropriate notice to the Commission. As this Court has stated, the purposes of these requirements "are preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant." *Arkla*, 453 U.S. at 577-78 (citing *City of Cleveland* v. *FPC*, 525 F.2d 845, 854 (D.C. Cir. 1976)). *See also Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 110 S. Ct. 2759, 2766 (1990).

Thus, contrary to the decision below, the doctrine's central purpose is to protect the agency's jurisdiction, not to curtail it. It assures that the Commission, rather than the parties to a regulated transaction or courts and state agencies, retains final and exclusive authority to determine the lawfulness of the rates subject to its jurisdiction. The doctrine, accordingly, does not speak to whether a rate is too high or too low or whether it includes an improper level or category of costs. It is entirely neutral with respect to the content of the rate. When it is shown that for a given transaction a natural gas company has charged the rate that was on file with the Commission, the inquiry under the filed rate doctrine is at an end. In the instant case, there is no contention

that Tennessee has not charged the rate prescribed by its filed tariff.

The court of appeals also accepted respondents' claim that by adopting the purchase deficiency method the Commission has engaged in retroactive ratemaking. This claim too is misplaced. Indeed, the retroactive ratemaking doctrine is wholly inapposite in this case. It derives from Section 5(a) of the NGA and constitutes a limitation on the Commission's power to change rates on a prospective basis. It provides, in pertinent part:

> Whenever the Commission * * * shall find that [a] rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company * * * is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate * * * *to be thereafter observed and in force*, and shall fix the same by order.

15 U.S.C. § 717d(a) (emphasis added). The Court has described this provision as preventing "the Commission itself from imposing a rate increase for gas already sold." *Arkla*, 453 U.S. at 578. The D.C. Circuit has held that the counterpart of this provision in the Federal Power Act bars the retroactive substitution of a reasonable rate for an unreasonable one and prohibits the regulated seller from recouping past losses through a subsequent rate increase. *City of Piqua* v. *FERC*, 610 F.2d 950, 954 (D.C. Cir. 1979) (*citing Nader* v. *FCC*, 520 F.2d 182 (D.C. Cir. 1975)). As the D.C. Circuit recently held in another case, the rule benefits or burdens buyer and seller alike, and its purpose is to assure "the finality of approved rates." *Public Utilities Commission of California* v. *FERC*, 894 F.2d 1372, 1383 (D.C. Cir. 1990).

Here, the take-or-pay costs at issue were not added to rates for sales already consummated, nor were those past rates intended to recover such costs. Indeed, Tennessee could not have filed to recover these costs in any

earlier filing. Moreover, the costs were proposed to be collected only from parties who were customers of Tennessee at the time of filing. In short, no plausible claim of retroactive ratemaking exists.

The significance of the lower court's erroneous interpretation of the filed rate doctrine transcends the facts of this case. Take-or-pay costs, to be sure, represent the largest economic consequence of the industry transition brought about by the NGPA and the Commission's regulatory initiatives, but it is far from the only consequence. Large balances of unrecovered purchased gas costs remain, stemming from retroactive producer price increases authorized by the Commission or other causes related to the transition to open-access transportation on many pipelines. Pipeline efforts to deal with these costs have been largely hamstrung by the D.C. Circuit's insistence that any form of direct billing that considers past purchases violates the filed rate doctrine. Indeed, because a mechanism to recover these costs outside the commodity charge is a prerequisite for the market-responsive pricing mechanisms contemplated by Order No. 500, the D.C. Circuit's holdings will have far-reaching implications as to the allocation of such costs and could seriously threaten the ability of pipelines to continue as gas merchants.

III. THE DECISION BELOW WOULD IMPROPERLY LIMIT THE COMMISSION'S RATEMAKING AUTHORITY.

Although purporting to decide purely an issue of statutory construction, the D.C. Circuit's decision in fact intrudes impermissibly on the ratemaking function of the Commission. As this Court has held, the Commission's authority to fix "just and reasonable rates" is exclusive, *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951), and that authority necessarily includes the right to decide any and all issues of cost allocation raised by a rate filing. In adopting an

allocation reflecting past purchases, therefore, the Commission has done no more than exercise the discretion conferred on it by the Natural Gas Act.

The lower court's holding that this allocation scheme is beyond the Commission's ratemaking powers has the inevitable effect, therefore, of dictating substantive ratemaking standards to be applied by the Commission. Although the court of appeals does not directly determine an allocation scheme, by placing extra-statutory restrictions on the Commission's ratemaking discretion it has usurped an essential administrative function. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984), this Court held:

> We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations. [citations omitted]
>
> * * * *
>
> If [the agency's] choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned. [citations omitted]

Because the court of appeals' decision in this case neither defers to the Commission's construction of the NGA nor respects the Commission's discretion to prescribe the principles to govern the calculation of rates, it exceeds the proper bounds of the court's review func-

tion and should be reversed. Furthermore, as noted by the Commission in its petition for writ of certiorari herein (Petition at 27), the court of appeals' decision in this case is not an isolated misapplication of the filed rate doctrine. In several recent cases, the court of appeals has dictated its view of what constitutes proper ratemaking, instead of properly deferring to the Commission's judgment. *See Columbia Gas Transmission Corp.* v. *FERC*, 831 F.2d 1135 (D.C. Cir. 1987), *modified on reh'g*, 844 F.2d 879 (D.C. Cir. 1988) (*"Columbia I"*); *Columbia Gas Transmission Corp.* v. *FERC*, 895 F.2d 791 (D.C. Cir. 1990) (*"Columbia II"*), *petitions for cert. filed*, 59 U.S.L.W. 3005 (U.S. June 22, 1990) (No. 89-2001) and 59 U.S.L.W. 3065 (U.S. July 18, 1990) (No. 90-131); and *Transwestern Pipeline Co.* v. *FERC*, 897 F.2d 570 (D.C. Cir. 1990), *petition for cert. filed* (U.S. August 24, 1990) (No. 90-344). INGAA submits that this trend by the D.C. Circuit to exceed the bounds of proper appellate review by dictating its own views of ratemaking must be halted.

For the foregoing reasons, INGAA urges this Court to grant the Commission's petition for writ of certiorari and heed the call issued by Chief Judge Wald of the D.C. Circuit:

> I think the Court's current interpretation of the filed rate doctrine is overly rigid, at a time when the FERC needs latitude to navigate the recent dramatic changes in the structure of the natural gas industry * * *. It remains for the Supreme Court to settle this important question of how impenetrable a barrier the filed rate doctrine is to FERC's efforts at allocating the inevitable burdens stemming from fundamental readjustment of the pipeline industry.

Transwestern Pipeline Co. v. *FERC*, 897 F.2d 570 (D.C. Cir. 1990) (Wald, C.J., separate statement issued with denial of rehearing *en banc*).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN H. CHEATHAM, III *
Senior Vice President and
General Counsel
555 13th Street, N.W.
Suite 300 West
Washington, D.C. 20004
(202) 626-3200
Attorney for Interstate Natural Gas Association of America

August 31, 1990

* Counsel of Record